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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. [redacted] 47

STATE OF WISCONSIN AND ELMER E. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,
Petitioners,

vs.

F. W. WOOLWORTH COMPANY, A NEW YORK CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

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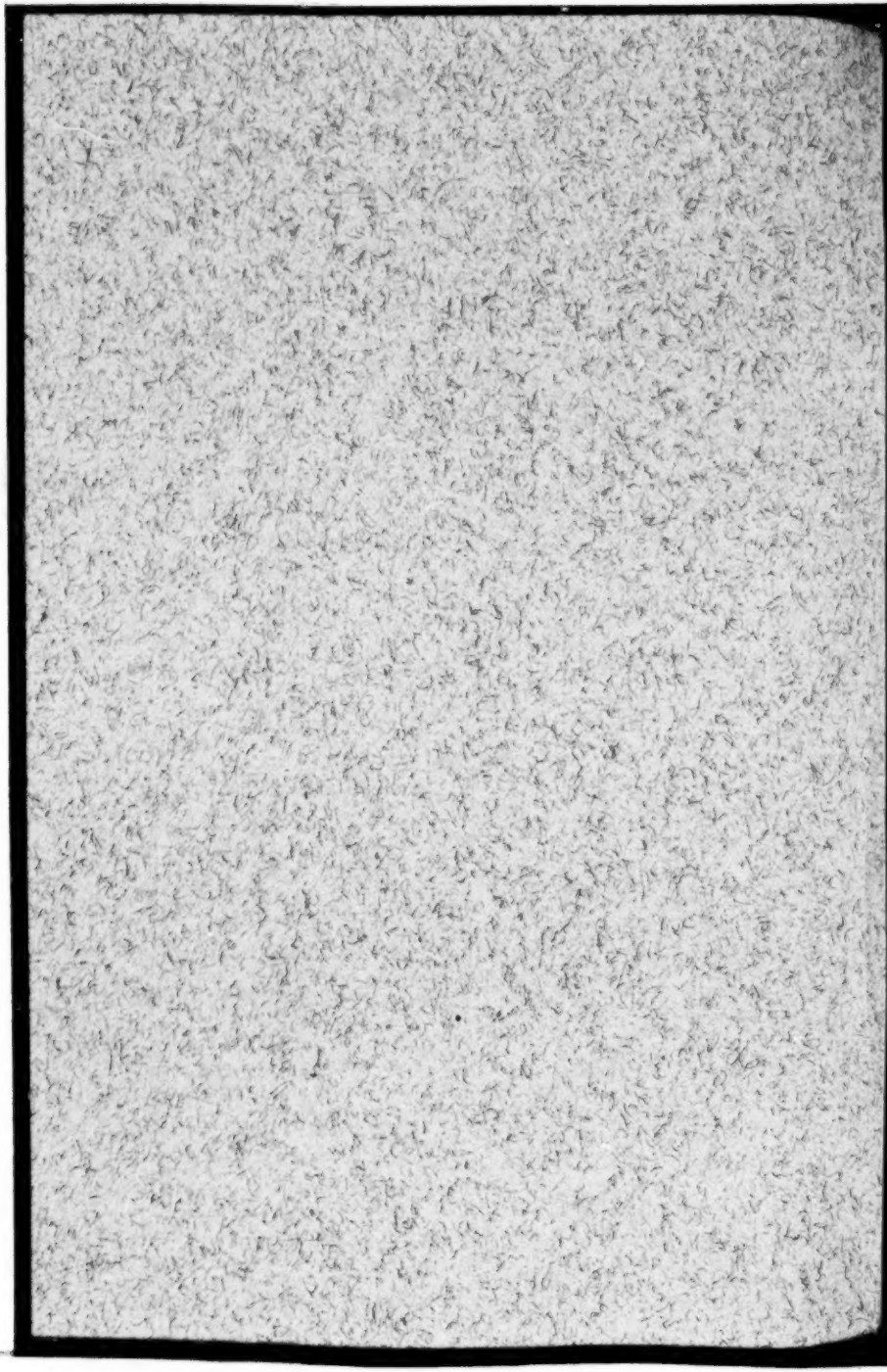

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Reasons relied on for the allowance of the writ	7
Prayer for the writ	11
Brief in support of petition for writ of certiorari	13
I. The opinion of the court below	14
II. Jurisdiction	14
III. Statement of the case	17
IV. Specification of errors	18
V. Argument	19
Summary of argument	19
Point A. The Supreme Court of Wisconsin erroneously predicated its decision on the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), upon the decision of this Court in *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77, 82 L. Ed. 673, 58 Sup. Ct. 436 (1938)	19
Point B. This Court has announced no decision construing the Fourteenth Amendment condemning the application of State tax laws, such as Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), to foreign corporations doing business in the State in the manner of the F. W. Woolworth Company.	19
Point C. On the contrary, applicable decisions of this Court sustain the validity of said Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), as applied to the F. W. Woolworth Company in the present case	19

Page

Conclusion 20

Appendix setting out Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended 22

Table of Cases Cited.

Blodgett v. *Silberman* (1928), 277 U. S. 1, 72 L. Ed. 749, 48 Sup. Ct. 410 16

Boynton v. *Hutchinson Gas Co.* (1934), 291 U. S. 656, 78 L. Ed. 1049, 54 Sup. Ct. 528 16

Coleman v. *Miller* (1939), 307 U. S. 433, 83 L. Ed. 1385, 59 Sup. Ct. 972 16

Connecticut General Life Ins. Co. v. *Johnson* (1938), 303 U. S. 77, 82 L. Ed. 673, 58 Sup. Ct. 436 ..... 10, 16, 19

Kelly v. *Washington ex rel. Foss Company* (1937), 302 U. S. 1, 82 L. Ed. 3, 58 Sup. Ct. 87 16

State ex rel. Froedtert G. & M. Co., Inc., v. *Tax Commission* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 ..... 9, 10, 15, 16

Table of Statutes Cited.

Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended by Chapter 552, Laws of Wisconsin, 1935 ..... 2, 22

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 893

STATE OF WISCONSIN AND ELMER E. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,
Petitioners,

vs.

F. W. WOOLWORTH COMPANY, A NEW YORK CORPORATION.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of the State of Wisconsin, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This petition is filed to obtain a review of the judgment of the Supreme Court of the State of Wisconsin, dated January 16, 1940, in the case of *F. W. Woolworth Company, a foreign corporation* v. *Wisconsin Tax Commission,* hold-

ing invalid an assessment of taxes against the F. W. Woolworth Company, a New York corporation, doing business in the State of Wisconsin pursuant to the laws thereof. The said judgment of the Supreme Court of the State of Wisconsin reversed a judgment of the Circuit Court for Dane County, Wisconsin, confirming an assessment of said taxes against said F. W. Woolworth Company, a corporation, as affirmed by a decision and order of the Wisconsin Tax Commission, dated July 21, 1938 (R. 77).

This petition is companion to the petitions for writs of certiorari, filed with this Court at the same time, to review the judgments of the Supreme Court of Wisconsin, entered on the same date as the judgment here sought to be reviewed, in the cases of *J. C. Penney Company, a foreign corporation* v. *Wisconsin Tax Commission* and *Minnesota Mining and Manufacturing Company, a foreign corporation* v. *Wisconsin Tax Commission.* The judgments in the three cases, while separate, were entered on the same date and are all based on the opinion of the Supreme Court of Wisconsin filed in the case of *J. C. Penney Company, a foreign corporation* v. *Wisconsin Tax Commission.* Thus, the petitions to this Court for writs of certiorari in all three cases present the same question and are companion.

The taxes involved, in the sum of $20,058.33, were assessed pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which imposes a tax upon corporate dividends paid out of income derived from property located or business transacted in the State of Wisconsin, the same statute involved in the petitions in the *J. C. Penney Company* and *Minnesota Mining and Manufacturing Company* cases, companion hereto. A copy of said Section 3 of Chapter 505, Laws of Wisconsin of 1935, effective upon its publication on September 26, 1935, and as amended by Chapter 552, Laws of Wisconsin of

1935, effective upon publication thereof on October 8, 1935, is printed as an Appendix to this petition.

Said taxing statute is a special act and imposes a tax on "all corporations (foreign and local)" "equal to two and one-half percentum of the amount of" dividends declared and paid, after the passage thereof and prior to July 1, 1937, out of income derived from property located and business transacted in Wisconsin. It provides that such tax shall be deducted and withheld by the corporation from the dividends paid to both residents and nonresidents of Wisconsin and that the corporation is made liable for the tax and the payment thereof.

In Subsection (4) thereof it is specifically provided that as to corporations doing business within and without the State of Wisconsin the tax shall apply only to dividends declared and paid out of income derived from business transacted and property located in Wisconsin and that the amount of income of such a corporation attributable to the State of Wisconsin shall be computed in the same manner as is provided in Chapter 71 of the Wisconsin Statutes, the general Income Tax Law of the State of Wisconsin, for the determination of the income of such type of corporations allocable as Wisconsin income.

The facts involved and upon which the Supreme Court of the State of Wisconsin based its judgment are not in dispute, and, while different, are in substance the same as in the companion case involving the J. C. Penney Company.

The F. W. Woolworth Company is a New York corporation, having its statutory office at Watertown, New York, and its principal business office in the Woolworth Building, New York City, New York. During the years involved it was engaged in the business of operating a chain of retail mercantile stores in 29 States, the District of Columbia and Cuba, and owns all or a part of the stock in other corporations engaged in the same business in the other 19 States,

Canada, Great Britain and Germany (R. 44). It is licensed to do business in the State of Wisconsin but has no executive office of any kind located within the State (R. 4). During the years 1934, 1935 and 1936 it operated about 55 stores in Wisconsin (R. 39). Computed on the Wisconsin tax basis, the corporation had a total net income during the year 1934 of $27,808,579.19, in 1935 a total net income of $24,606,991.08, and in 1936 a total net income of $25,102,-593.64 (R. 4). Applying the formula of the Wisconsin income tax statute (Section 71.02, Wisconsin Statutes 1935) $555,538.44 of the 1934 net income was allocable to Wisconsin business, $579,548.66 of the 1935 net income was allocable to Wisconsin business, and $576,522.38 of the 1936 net income was allocable to Wisconsin business (R. 4).

On each of the following dates, to-wit: December 2, 1935, March 2, 1936, June 1, 1936, September 1, 1936, December 1, 1936, and March 1, 1937, the F. W. Woolworth Company declared a dividend on all its outstanding stock, and on each of said dates paid a total dividend of $5,850,000. Of each of said dividends $5,822,167.80 was paid on shares outstanding in the hands of stockholders, and the balance of $27,832.20 of each dividend was paid upon shares outstanding but held in the Company's treasury (R. 5). Each of these dividends was declared by the board of directors at meetings held in New York City, New York (R. 34).

The F. W. Woolworth Company operates its business in the following manner: from the proceeds from sales of goods in each store, including Wisconsin stores, the local manager pays the local expenses such as payrolls and small supplies. He deposits the balance above these requirements in a local bank. Periodically the Minneapolis district office draws on this bank account and when so drawn the moneys are combined at the Minneapolis office with moneys similarly drawn from banks from other States in the Minneapolis district. No attempt is made to keep the money sep-

arate from the different States. The Minneapolis office uses the moneys so received to pay merchandise bills, alteration, and other expenses (R. 35). A separate accounting for each store is kept at the Minneapolis office (R. 41). From time to time the district office accumulates funds above these requirements which are transmitted to the main office in New York City and deposited in New York banks to the credit of the corporation (R. 35). From the funds deposited in New York salaries, general overhead expenses in New York and other offices, taxes and dividends are paid (R. 36). All of the stockbooks, minute books and secretary's records of the corporation are kept in the State of New York. All transfers of shares of stock are made by the New York transfer agent of the corporation; all directors and stockholders' meetings are held in the State of New York (R. 36). All dividends are declared at such meetings (R. 34). The actual payment of dividends is effected by a check drawn upon the bank account of the corporation in New York, payable to its transfer agent, City Bank Farmers Trust Co. of New York City for the total amount of each dividend declared. The transfer agent then prepares checks payable to each stockholder of record which it mails in New York City to the postoffice address of each stockholder as the same appears in the record (R. 34). No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders lived and received their mail in Wisconsin (R. 34). As of the said dividend dates there were in excess of 50,000 stockholders of the company owning 9,703,613 shares of which not more than 470 were residents of the State of Wisconsin owning not more than 14,597 shares (R. 7).

Pursuant to a notice of an additional assessment dated July 16, 1937, in accordance with the procedural provisions

of the Wisconsin statutes, the Wisconsin Tax Commission assessed a tax against the said F. W. Woolworth Company, a corporation, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which was ultimately adjusted at the sum of $20,058.33 (R. 50-52). The corporation duly filed its objections to said assessment and applied for a hearing thereon within the period, in the manner and as provided by the Wisconsin Statutes in such instances (R. 53, 54). Thereupon the matter was heard by the Wisconsin Tax Commission and on December 19, 1938, it entered a decision and order sustaining the assessment of said taxes, as adjusted in the amount of $20,058.33, exclusive of interest and penalties (R. 26).

The assessment of said taxes and the decision and order of the Wisconsin Tax Commission sustaining the same, upon the application of the corporation pursuant to the provisions therefor in the Wisconsin Statutes, were duly reviewed by the Circuit Court for Dane County, Wisconsin, and on June 10, 1939, judgment was entered therein confirming the same (R. 68). Upon appeal therefrom by the F. W. Woolworth Company in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on January 16, 1940, rendered its decision and judgment reversing the judgment of said Circuit Court and holding that said taxes so assessed, and the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, as applied to said F. W. Woolworth Company, under the facts as stated, were invalid as depriving the said F. W. Woolworth Company, a corporation, of its property without due process of law in violation of the 14th Amendment to the Constitution of the United States, based upon the opinion filed and the decision of the Supreme Court of Wisconsin in the case of *J. G. Penney Company, a foreign corporation,* v. *Wisconsin Tax Commission,* on the same date (R. 78). It is this decision and judgment of the

Supreme Court of the State of Wisconsin that is here sought to be reviewed.

The record upon which this petition is here presented is composed of the printed case as used in the Supreme Court of the State of Wisconsin, being pages numbered 1 to 71 of the Record as certified to this Court, together with the opinion of the Supreme Court of the State of Wisconsin and the proceedings therein, comprising pages numbered 72 to 79 of the Record as certified to this Court.

B.

Reasons Relied On for the Allowance of the Writ.

The reasons relied upon for the allowance of the writ are the same as those set out in the petition for certiorari in the companion cases of *J. C. Penney Company* v. *Wisconsin Tax Commission* and *Minnesota Mining and Manufacturing Company* v. *Wisconsin Tax Commission.*

1. The question presented is the constitutionality of the Wisconsin tax statute, Section 3 of Chapter 505, Laws of 1935 (as amended) as applied to the F. W. Woolworth Company, a New York corporation doing business in Wisconsin, under the facts as previously stated, and of the taxes of $20,058.33 assessed against said corporation pursuant to said taxing act. The facts relating thereto are not in dispute and are contained in the record made before the Wisconsin Tax Commission. No issue as to the facts was raised or presented in the State courts of Wisconsin and none now exists or is here presented. Likewise, no question has been raised, and none exists, as to the correctness of the procedure in the assessment of the taxes involved or in the review of the assessment in the court proceedings. Consequently, a discussion of those procedural matters is not relevant to the purposes of this petition.

The only controversy at issue involved in the proceedings in the State courts and decided by the Supreme Court of Wisconsin in rendering the judgment sought to be reviewed, is whether the Fourteenth Amendment to the Constitution of the United States precludes the State of Wisconsin from imposing the tax as provided in Section 3 of Chapter 505, Laws of 1935 (as amended), upon the F. W. Woolworth Company, a foreign corporation, under the facts set out in the record. This is solely a question of law and purely a Federal question. The judgment of the Supreme Court of Wisconsin sought to be reviewed is based solely on its decision upon that question. The petitioners contend that its decision upon said Federal question is erroneous and should be reversed.

2. Following notice of the assessment of the taxes involved and upon appropriate request therefor by the F. W. Woolworth Company, a hearing in respect to said assessment was had and conducted by the Wisconsin Tax Commission, which by order, dated December 19, 1938, sustained the assessment. Thereupon, pursuant to the statutes of Wisconsin providing therefor, the F. W. Woolworth Company appealed from the decision of the Wisconsin Tax Commission to the Circuit Court for Dane County, Wisconsin, and the Supreme Court of Wisconsin, successively. In the application for hearing before the Wisconsin Tax Commission (R. 54), and in the notice of appeal from the order of the Wisconsin Tax Commission to the Circuit Court for Dane County, Wisconsin (R. 2), the claim was made by the F. W. Woolworth Company that Section 3 of Chapter 505, Laws of Wisconsin of 1935 (as amended) as applied to it under the existent facts purports to impose a tax beyond the taxing jurisdiction of the State of Wisconsin, and therefore is invalid as violative of the due

process provision of the Fourteenth Amendment to the Constitution of the United States. The same claim was made on the appeal to the Supreme Court of Wisconsin, and its decision sustaining said claim of the F. W. Woolworth Company the petitioners contend is erroneous and should be reversed.

3. The Wisconsin Tax Commission held that it was without authority to pass upon the constitutional question involved (R. 25) and the Circuit Court for Dane County, Wisconsin, decided it adversely to the corporation (R. 67), upon the authority of the decision of the Supreme Court of Wisconsin upon the question, rendered in 1936 in *State ex rel. Froedtert G. & M. Co., Inc.* v. *Tax Commission* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478. In the cited case the Supreme Court of Wisconsin in an action for declaratory judgment had expressly declared Section 3 of Chapter 505, Laws of 1935 (as amended) to be constitutional as imposing a tax within the taxing jurisdiction of the State of Wisconsin as applied to both foreign and domestic corporations, over objection that it violated the due process provision of the Fourteenth Amendment to the United States Constitution. Upon appeal by the F. W. Woolworth Company to the Supreme Court of Wisconsin from the judgment of the Circuit Court for Dane County, Wisconsin, confirming the order of the Wisconsin Tax Commission and the adjusted taxes as there sustained, the corporation renewed its objection that as applied to it Section 3 of Chapter 505, Laws of 1935 (as amended) and the taxes assessed pursuant thereto were violative of the due process provision of the Fourteenth Amendment to the United States Constitution. The Supreme Court of Wisconsin sustained that objection and

overruled its prior decision in the case of *State ex rel. Froedtert G. & M. Co., Inc.* v. *Tax Commission* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, insofar as that prior decision held that said law imposed a valid tax as applied to foreign corporations doing business in Wisconsin under facts the same as those existent as to the F. W. Woolworth Company (R. 78). The petitioners contend that this decision upon the Federal question involved and overruling the prior decision thereon is erroneous and should be reversed.

4. The said decision of the Supreme Court of Wisconsin to the effect that Section 3 of Chapter 505, Laws of 1935 (as amended) was invalid as applied to foreign corporations was based squarely upon the decision of this Court in the case of *Connecticut General Life Ins. Co.* v. *Johnson* (1938), 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, which was decided by this Court subsequently to the decision in the case of *State ex rel. Froedtert G. & M. Co., Inc.* v. *Tax Commission* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478. Upon the basis of the facts existing in the instant case the Supreme Court of Wisconsin held that the decision of this Court in the case of *Connecticut General Life Ins. Co.* v. *Johnson* (1938), 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, was controlling and required it to overrule its prior decision upon the question and held that Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), as applied to a foreign corporation doing business in Wisconsin in the manner of the F. W. Woolworth Company, imposes a tax beyond the taxing jurisdiction of the State of Wisconsin. It is the contention of the petitioners that the Supreme Court of Wisconsin erred in so construing and applying the decision of this Court in

that case and that said decision is nether controllng nor applicable to the question here involved.

5. The petitioners, moreover, contend that no other decision of this Court holds that a tax such as that provided by Section 3 of Chapter 505, Laws of 1935 (as amended) as applied to foreign corporations doing business in the taxing State under and pursuant to the laws thereof, is contrary to the Fourteenth Amendment to the United States Constitution, and that no decision of this Court requires such a holding or sustains the decision of the Supreme Court of Wisconsin to that effect.

6. The petitioners further contend that although the precise question involved has not been passed upon by this Court, the decision of the Supreme Court of Wisconsin that Section 3 of Chapter 505, Laws of 1935 (as amended), as applied to foreign corporations doing business in Wisconsin, is invalid as contravening the due process clause of the Fourteenth Amendment to the United States Constitution, is not in accord with applicable decisions of this Court and assign the same as error for which said decision should be reviewed and reversed.

WHEREFORE, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Wisconsin, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 97, August Term, 1939, *F. W. Woolworth Company, a foreign corporation, Appellant,* v. *Wisconsin Tax Commission, Respondent,* and that the said judgment of the Supreme Court of Wisconsin may be reversed by this Honorable Court, and that your petitioners

may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE STATE OF WISCONSIN, AND
ELMER E. BARLOW,
as Commissioner of Taxation
of the State of Wisconsin,
By JOHN E. MARTIN,
Attorney General of Wisconsin,
JAMES WARD RECTOR,
Deputy Attorney General of Wisconsin,
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 893

STATE OF WISCONSIN AND ELMER E. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,
Petitioners,

VS.

F. W. WOOLWORTH COMPANY, A NEW YORK CORPORATION.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The petition herein presents the identical question that is presented in the petitions for writs of certiorari in the two companion cases involving the *J. C. Penney Company* and the *Minnesota Mining and Manufacturing Company*, respectively. The jurisdictional claims, errors assigned and arguments are identical with those in the brief in support of the petition in the *J. C. Penney Company* case. While slightly different, the facts, so far as they relate to the question presented, are substantially the same.

I.

The Opinions of the Court Below.

The opinion in the Supreme Court of Wisconsin, filed January 16, 1940, is reported in 289 N. W. 685, but is not as yet reported in the official State reports (R. 78).

II.

Jurisdiction.

1. This petition is filed pursuant to Section 237b of the Federal Judicial Code (28 U. S. C. A. 344 (b)) which provides:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the Unted States; or *where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution,* treaties, or laws of the United States; *or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution,* or any treaty or statute *of,* or commssion held or authority exercised under, the *United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied.* Nothing in this paragraph shall be construed to limit or detract from the right to a review on an appeal in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on an appeal might be obtained under the preceding paragraph be

an obstacle to granting a review on certiorari under this paragraph." (Emphasis ours.)

2. Petitioners also rely on Rule 38 of the Rules of this Court and particularly on Paragraph 5 thereof which provides in part:

"5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this court."

3. The date of the judgment to be reviewed is January 16, 1940 (R. 77).

In its application for a hearing before the Wisconsin Tax Commission upon the assessment involved (R. 54) and in its pleadings upon the statutory appeal to the circuit court for Dane County, Wisconsin from the decision of the Wisconsin Tax Commission confirming the assessment (R. 2), the F. W. Woolworth Company, among other things, claimed immunity from the tax upon the ground that Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) in so far as it imposed a tax upon the Company was contrary to the Fourteenth Amendment to the United States Constitution because it taxed beyond the taxing jurisdiction of the State of Wisconsin and thus deprived the F. W. Woolworth Company of its property without due process.

The Circuit Court for Dane County, Wisconsin, upheld the validity of the tax in question as applied to the F. W. Woolworth Company upon the authority of *State ex rel.*

Froedtert G. & M. Co., Inc. v. *Tax Commission,* (1933) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, in which case the Supreme Court of Wisconsin in a declaratory judgment in 1936 had expressly sustained the validity of said tax law as applied to both foreign and domestic corporations over objection that it contravened the due process provisions of the Fourteenth Amendment to the Constitution of the United States (R. 67, 68).

The Supreme Court of Wisconsin, upon appeal from the Circuit Court, sustained the contention of the F. W. Woolworth Company and held that the said Section 3 of Chapter 505, (as amended) was invalid in so far as it purported to impose a tax upon the devolution of dividends of the F. W. Woolworth Company to its stockholders. The court thus expressly overruled its decision in the case of *State ex rel. Froedtert G. & M. Co. Inc.,* v. *Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, and did so specifically upon the authority of *Connecticut General Life Ins. Co.* v. *Johnson,* (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436 (R. 78).

Thus, a statute of the State of Wisconsin was held to be invalid upon the basis of an asserted conflict with the Fourteenth Amendment to the United States Constitution as interpreted by this Court.

The cases upon which petitioner relies in support of jurisdiction are:

Blodgett v. *Silberman,* (1928) 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410;

Boynton v. *Hutchinson Gas Co.,* (1934) 291 U. S. 656, 78 L. Ed. 1049, 54 S. Ct. 528;

Kelly v. *Washington ex rel. Foss Company,* (1937) 302 U. S. 1, 82 L. Ed. 3, 58 S. Ct. 87;

Coleman v. *Miller,* (1939) 307 U. S. 433, 83 L. Ed. 1385, 59 S. Ct. 972.

III.

Statement of the Case.

The controversy at issue arose out of an assessment of taxes, in the amount of $20,058.33, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) against the F. W. Woolworth Company, a New York corporation, doing business in the State of Wisconsin under and pursuant to the laws of Wisconsin. A copy of Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended by Chapter 552, Laws of Wisconsin, 1935) may be found in the Appendix herein. In substance, it imposes a tax on all corporations, foreign and local, equal to 2½% of the amount of dividends declared and paid out of income derived from property located and business transacted in the State of Wisconsin. The corporation declaring the dividend is made liable for the tax and required to deduct the same from the dividend.

The F. W. Woolworth Company, a New York corporation, requested a hearing upon the assessment before the Wisconsin Tax Commission (R. 54). The Wisconsin Tax Commission confirmed the assessment (R. 22). The F. W. Woolworth Company appealed to the Circuit Court for Dane County, Wisconsin and, as appears from the record on said appeal (R. 2), it alleged that Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) so far as it imposed the tax upon the F. W. Woolworth Company, was in conflict with the Fourteenth Amendment to the United States Constitution because it imposed a tax beyond the State's jurisdiction to tax and thereby deprived the company of its property without due process of law.

The Circuit Court for Dane County rejected the Company's claim of immunity from the tax and confirmed the assessment (R. 67).

Upon appeal from the judgment of the Circuit Court the Wisconsin Supreme Court reversed the judgment of the Circuit Court and upheld the Company's claim to immunity from the tax. Thus, the Court held that, in so far as the said Section 3 of Chapter 505 (as amended), imposed a tax upon the devolution of dividends from the F. W. Woolworth Company to its stockholders paid out of income earned in Wisconsin, it was contrary to the Fourteenth Amendment to the United States Constitution (R. 78). While other issues were raised in the case none was decided except the constitutional question to which reference has been made.

The facts material to the consideration of the questions presented have been covered and set out under heading "A" in the petition and in the interests of brevity and elimination of repetition the statement thereof is not here repeated. As previously stated the facts, so far as pertinent to the questions here presented, are in substance the same as those in the two companion cases involving the *J. C. Penney Company* and the *Minnesota Mining and Manufacturing Company.*

IV.

Specification of Errors.

1. The Supreme Court of Wisconsin erred in holding that Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended by Chapter 552, Laws of Wisconsin, 1935) as applied to the F. W. Woolworth Company, under the existing facts, imposed a tax beyond the taxing jurisdiction of the State of Wisconsin and therefore is invalid as in conflict with the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Wisconsin erroneously held that the assessment of the taxes involved, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin,

1935 (as amended by Chapter 552, Laws of Wisconsin, 1935), against the F. W. Woolworth Company, a corporation, under the existing facts constitutes a deprivation of property of the F. W. Woolworth Company without due process of law because beyond the taxing power of the State of Wisconsin and therefore is invalid as violative of the Fourteenth Amendment to the Constitution of the United States.

V.

ARGUMENT.

Summary of Argument.

POINT A. The Supreme Court of Wisconsin erroneously predicated the decision on the Validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) and the tax thereby imposed upon the decision of this Court in Connecticut *General Life Ins. Co.* v. *Johnson,* (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436.

POINT B. This Court has announced no decision construing the Fourteenth Amendment condemning the application of State tax laws such as Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) to foreign corporations doing business in the State in the manner of the F. W. Woolworth Company.

POINT C. On the contrary, applicable decisions of this Court sustain the validity of said Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) as applied to the F. W. Woolworth Company in the present case.

The arguments in this case upon the above points are identical with the arguments fully stated at length under the heading "V" in the brief in support of the petition for writ of certiorari in the companion case in this Court,

under the title, *State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of the State of Wisconsin, Petitioners,* v. *J. C. Penney Company, a Delaware corporation, Respondent,* filed at the same time as this brief. In the interests of brevity and elimination of repetition, such arguments will not be here repeated, but are expressly referred to, incorporated herein, and made a part hereof the same as if repeated and set forth at length herein.

The decision of the Supreme Court of Wisconsin, sought to be reviewed in this case, is based upon its opinion and decision in *J. C. Penney Company, a foreign corporation,* v. *Wisconsin Tax Commission,* reported in 289 N. W. 677, but not as yet reported in the official reports. The opinion of the Supreme Court of Wisconsin in the instant case reported in 289 N. W. 685 expressly says that the judgment in the instant case was rendered for the reasons stated in its opinion in the case of *J. C. Penney Company, a foreign corporation* v. *Wisconsin Tax Commission,* reported in 289 N. W. 677.

That counsel for the F. W. Woolworth Company, a New York corporation, the respondent herein, may be fully and completely presented with such arguments, copies of the brief in support of the petition for writ of certiorari in the companion case in this Court under the title, *State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of the State of Wisconsin, Petitioners,* v. *J. C. Penney Company, a Delaware corporation, Respondent,* will be furnished and served on respondent and its counsel as a part of and at the same time as the service of the brief herein.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and that to such end a writ of certiorari should be

granted and this Court should review the decision of the Supreme Court of Wisconsin and finally reverse it.

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APPENDIX.

Section 3, Chapter 505, Laws of Wisconsin, 1935, Effective on its Publication on September 26, 1935, and as Amended by Chapter 552, Laws of Wisconsin, 1935, Effective on its Publication on October 8, 1935, Provides:

Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corpo-

rate surplus and undivided profits derived from business transacted and property located within the state.

(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipt of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders.

(7) For the purposes of this section dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividend or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury.